80-1172

Supreme Court, U. S.
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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

LeRoy and Leona Buttke,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Berentje C. M. Pohlman
Attorney for Petitioners
Enderlin, North Dakota
58027

COUNSEL FOR RESPONDENT

M. Carr Ferguson,
Assistant Attorney General

Gilbert E. Andrews,
Michael L. Paup,
Karl P. Fryzel,
Attorneys,
Tax Division
Department of Justice,
Washington, D. C. 20530

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vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioners apply for a Writ of Certiorari and in support of their application state:

QUESTIONS PRESENTED

Whether the provision of the Tax Reform Act of 1976 retroactively increasing the Minimum Tax on capital gains from date of passage of the Act (October 4, 1976) to all taxable years after December 31, 1975, is violative of petitioners' constitutional rights under the due process clause of the Fifth Amendment to the United States Constitution.

OPINIONS BELOW

The judgment of the Court of Appeals herein sought to be reviewed is reproduced and reprinted in full in the Appendix to this Petition, pp 1-3. The opinion of the United States Tax Court is reprinted in the Appendix to this Petition, pp 4-12.

JURISDICTION

The decision of the Tax Court was entered in July, 1979, and a timely appeal was filed by Petitioners to the Circuit Court of Appeals for the Eighth Circuit. The opinion of the Circuit Court, affirming the Tax Court decision was entered July 9, 1980. The jurisdiction of the Supreme Court is invoked under U. S. Constitution, Article 3, Sec. 2 c12; 28 USCX Sec. 1254 (1); Supreme Court Rule 19, Secs. (2) and (b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves that portion of the Fifth Amend-

ment to the Constitution of the United States, which provides, as follows:

"No person shall be . . .deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

This is an income tax case wherein petitioners challenge the constitutionality of the retroactive increase in the rates of the Minimum Tax on capital gains as contained in the Tax Reform Act of 1976.

In 1975 Petitioners entered into a sales agreement for the sale of their farmland situated near Enderlin, North Dakota. The agreement provided for payment of the purchase price in cash, and the sale was consumnated in March of 1976. The petitioners decided on a cash sale based on their belief that the income tax liabilities would be payable at the rates in effect at the time of the sales agreement. Petitioners filed and paid the income taxes on the capital gains on a timely basis, but inadvertently omitted a computation of the so-called Minimum Tax on the gains as a tax preference item. (Text of Minimum Tax in effect March, 1976 is reproduced in Appendix p. 13)

Internal Revenue Service thereafter assessed the petitioners for a Minimum Tax based on the increase rates incorporated into the Tax Reform Act of 1976, which increased rates were retroactive from the date of passage of the Act (October 4, 1976) to all taxable years after December 31, 1975.[1] The so-called Minimum Tax that would have been payable by petitioners under the Minimum Tax law in effect prior to October 4, 1976 would have been $3,896. By virtue of the 1976 Tax Reform Act retroactive provision and the increase in the Minimum Tax rate, the petitioners were assessed a minimum tax of $11,607 on their 1976 land sale, resulting in an increase of their 1976 taxes in the sum of $7,711 more than would have been assessable prior to the 1976 retroactive amendment.

Petitioners do not challenge the constitutionality of the so-called Minimum Tax in effect prior to October 4, 1976, but challenge the validity of the radical increase in the tax rate brought about by the retroactive amendment.

The Rulings Below

The U. S. Tax Court ruled that although it was

1. (Amended Minimum Tax as applicable herein reproduced in Appendix p. 14)

unfortunate that petitioners were caught in the retroactive provisions of the 1976 Tax Reform Act as relates to the increase of the Minimum Tax (Appendix p. 8 & 12), it was the Tax Court's opinion that the amended Minimum Tax provisions are constitutional.

The opinion of the U. S. Tax Court affirmed the U. S. Tax Court, without giving petitioners opportunity for oral argument.

REASONS FOR GRANTING THE WRIT

I.

All taxpayers should be equally protected against unforeseen and unascertainable retroactive increases in tax rates and tax bases.

II.

All citizens should be equally treated as relates to challenges of tax legislation, and a petition for determination of a constitutional question should be given its day in court for a determination of the merits of petitioners' allegations.

It is petitioners' allegation that the retroactive provisions of the 1976 Act constitutionally

were "harsh and oppressive" as related to their particular circumstances, and that imposition of the so-called minimun tax is in itself discriminatory against taxpayers who take cash for a land sale instead of an election to sell on installment basis. They petitioned to present their factual situation to the Tax Court, but were rejected. Instead, the Tax Court states that petitioners should have anticipated the possibility of a substantial increase in their tax obligation as related to the land sale. Such reasoning as set out in the Tax Court's opinion leaves the citizen with no actual vested constitutional property rights.

The petitioners' attempt to challenge the right of Congress to impose a substantial tax increase upon taxpayers through retroactive legislation has been treated by the Tax Court and the appeals court in a condescending and patronizing manner. The upholding of the right of Congress to impose this kind of legislation upon a hapless citizenry is a violation of the rights of the citizenry to plan business activities without the fear of deprivation of their property rights through unknown future Congressional acts.

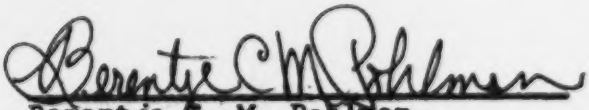
Petitioners submit, not only as relates to the subject matter of this appeal, but as relates to the taxation of all citizens, that in the absence of a national emergency, a substantial increase in a tax obligation through retroactive legislation is a deprivation of property rights and due process of law, and as such is violative of the due process guaranteed by the Fifth Amendment of the United States Constitution.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted.

Dated October 3, 1980

Respectfully submitted,



Berentje C. M. Pohlman
Attorney for Petitioners, LeRoy and Leona Buttke
Enderlin, North Dakota 58027

APPENDIX 1

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 79-1885

LeRoy and Leona Buttke, Appellants, v. Commissioner of Internal Revenue, Appellee.	* * * * * * * * * *	Appeal from the United States Tax Court

Submitted: April 16, 1980

Filed: July 9, 1980

Before LAY, Chief Judge, ROSS, Circuit Judge, and LARSON,* Senior District Judge.

PER CURIAM.

LeRoy and Leona Buttke, (taxpayers), appeal a tax court decision upholding the retroactive application of title III of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1549 (1976) (the Act), and the deficiency in taxpayers' 1976 income taxes assessed by the Commissioner of the Internal Revenue Service, (the Commissioner)

* Earl R. Larson, Senior District Judge, District of Minnesota, sitting by designation

in the amount of $11,606.55. We affirm.

In title III of the Act, Congress amended the minimum tax for preferential items, 26 U.S.C. && 55-58, by increasing the rate of taxation from ten to fifteen per cent, and reducing the amount of exempted preference items from $30,000.00 or the deduction for regular taxes, to $10,000.00, or one-half of regular tax liability. See Tax Reform Act of 1976, Pub. L. No. 94-455, & 301 (a), 90 Stat. 1549 (codified at 26 U.S.C. & 56 (a) (Supp. 1980)). The Act was enacted in October, 1976, but was made effective for all tax years after December 31, 1975. See Tax Reform Act of 1976, Pub. L. No. 94-455, & 301 (g), 90 Stat. 1553 (1976), as amended by Act of October 20, 1976, Pub. L. No. 94-568, & 3, 90 Stat. 2697 (1976).

Taxpayers sold real estate for cash in March of 1976, They reported it as a capital gain on their 1976 income tax return, but failed to treat the gain as subject to the minimum tax for preferences. The Commissioner calculated a deficiency according to 26 U.S.C. & 56, as amended by the Act. Taxpayers filed for a redetermination in the tax court. They contended the retroactive application of the Act was discriminatory, harsh and oppresive

APPENDIX 3

beeause theirs was a "once-in-a-lifetime" transaction by persons of modest means.

The tax court held that taxpayers should have anticpated the imposition of a minimum tax because it was in existence at the time they allegedly contracted to sell the real estate. Thus, the retroactive increase was not so harsh or discriminatory as to violate the Constitution. See Welch v. Henry, 305 U.S. 134, 147 (1938); cf. Untermyer v. Anderson, 276 U.S. 440 (1928) (retroactive application of wholly new tax invalid).

We have reviewed the briefs and applicable law, and find there was no error committed by the tax court. We affirm on the basis of its well-reasoned opinion, Buttke v. Commissioner, 72 T. C. 677 (1979). See 8th Cir R. 14.[1]

ORDER AFFIRMED.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT..

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1 The tax court recently reaffirmed the Buttke decision in Estate of Kearns v. Commissioner, 73 T.C. No. 96 (March 27, 1980).

APPENDIX 4

72 T. C. No. 58

UNITED STATES TAX COURT

LEROY AND LEONA BUTTKE, Petitioners v. Commissioner of Internal Revenue, Respondent

Docket No. 13532-78. Filed July 16, 1979.

The Tax Reform Act of 1976, enancted on October 4, 1976, amended the minimum tax provisions, effective for all "taxable years beginning after December 31, 1975" Prior to this amendment, the tax imposed was generally equal to 10 percent of the amount by which the sum of the items of tax preference exceeded $30,000. After the amendment, the tax imposed is 15 percent of the amount by which the sum of the items of tax preference exceed the greater of $10,000 or the "regular tax deductions."

HELD, the provision of the Tax Reform Act of 1976 making a new base and rate for the application of the minimum tax provisions retroactive to taxable years beginning after December 31, 1975, is not unconstitutional.

Berentje C. M. Pohlman, for the petitioners.

Dale L. Newland, for the respondent.

OPINION

FEATHERSTON, Judge: This motion for judgment on the pleadings was assigned to and heard by Special Trial Judge Lehman C. Aarons, pursuant to the provisions of section 7456 (c) of the Internal Revenue Code of 1954, as amended. The Court agrees with and adopts his opinion which is

set forth below.[1]

OPINION OF SPECIAL TRIAL JUDGE

AARONS, Special Trial Judge: This matter is before the Court on respondent's motion for judgment on the pleadings. The issue herein is the constitutionality of the minimum tax for tax preferences particularly as it affects 1976 transactions prior to the enactment of the Tax Reform Act of 1976. The motion was argued by counsel for both parties at the May 16, 1979 trial session of this Court at St. Paul, Minnesota. The Court has given careful consideration to their arguments as well as to the memoranda, filed on behalf of both parties, setting forth their legal positions.

Petitioners resided in Enderlin, North Dakota at the time of filing their petition herein.

Respondent determined a deficiency in petitioners' federal income tax for 1976 in the amount of $11,606.55. The issue presented by the pleadings is purely legal.

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1 Since this is a motion for judgment on the pleadings, the Court has concluded that the post-trial procedures of Rule 182, Tax Court Rules of Practice and Procedure, are not applicable in these particular circumstances. This conclusion is based on the authority of the "otherwise provided" language of that rule.

In March 1976 petitioners sold a piece of real estate for cash and reported long term capital gains thereon in the amount of $174,760. Petitioners failed, on their 1976 return, to treat 50% of that gain ($87,380) as subject to the minimum tax.

The minimum tax for tax preferences (originally sections 56, 57 and 58 of the Internal Revenue Code) was first instituted by the Tax Reform Act of 1969, Pub. L. 91-172, 83 Stat. 487. The tax imposed was generally equal to 10% of the amount by which the sum of the items of tax preference, as defined in section 57, exceeded $30,000. The Tax Reform Act of 1976, Pub. 1. 94-455, 90 Stat. 1520, enancted on October 4, 1976, amended the minimum tax provisions, effective under section 301 (g) of the Act for all "taxable years beginning after December 31, 1975." The new section 56 imposed the minimum tax at the rate of 15 percent of the amount by which the sum of the items of tax preference exceeded the greater of $10,000 or the "regular tax deduction."

Petitioners raise several arguments in their memorandum in opposition to respondent's motion for judgment on the pleadings. They contend that the minimum tax pro-

visions for 1976 were invalid because the Tax Reform Act of 1976 imposed a retroactive tax on them, with harsh and oppressive results. However, it has long been settled that an income tax can be retroactive without violating the Constitution. In Brushaber v. Union Pacific R. R. Co., 240 U. S. 1 (1916), the Supreme Court determined that an income tax enacted on October 3, 1913, could constitutionally tax income earned during the period from March 1 to December 31, 1913. In so holding the Court quoted the following language from Stockdale v. Insurance Co., 87 U.S. (20 Wall.) 323, 331 (1873):

> The right of Congress to have imposed tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed.

In determining whether a retroactive tax violates the due process clause of the Fifth Amendment, we note the criteria delineated by the Supreme Court in Welch v. Henry, 305 U. S. 134, 147 (1938):

> *** In each case it is necessary to consider the nature of the tax and the circumstances

> in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

Petitioners allege that the capital gain subject to the minimum tax here was a once-in-a-lifetime gain from the sale of a farm, that they are persons of modest means, and that under these circumstances the tax is harsh and oppressive. While we are sympathetic with petitioners' plight, in light of the cases in which retroactive taxes have been upheld, we cannot find the application of this tax "so harsh and oppressive as to transgress the constitutional limitation." For example, in Welch v. Henry, supra, the Court upheld the constitutionality of a Wisconsin statute, enacted in 1935, imposing an emergency tax for relief purposes on dividends received from Wisconsin corporations in 1933 (at which time such dividends had been exempt from state income tax). Similarly, a retroactive interest equalization tax of 15 percent of value of purchases of foreign equity securities by U. S. persons from foreign persons was upheld in First National Bank in Dallas v. United States, 190 Ct. Cl.

400, 420 F. 2d 725 (1970).

When petitioners made the real estate sale and recognized a capital gain 1976, the minimum tax had been in effect for over five years. Although petitioners may not have been aware of it[2], the tax was a part of the Internal Revenue Code even in 1975, when, petitioners allege, the contract of sale was negotiated and signed. The changes made by the Tax Reform Act of 1976 merely increased the rate of the tax and reduced the amount of tax preferences which were exempt from it. As the court wrote in Cohan v. Commissioner, 39 F. 2d 540, 545 (2d Cir. 1930), "Nobody has a vested right in the rate of taxation, which may be retroactively changed at the will of the Congress at least for periods of less than twelve months." In that case, the Court went on to say (at p. 545):

Such a one (as petitioners herein) may indeed

---

2 Petitioners argue that they should be excused from paying theminimum tax because the Internal Revenue Service did not give the public sufficient notice of its enactment, through tax forms and instructions or other means. However petitioners, just as everyone else, are charged with knowledge of the U.S. Statutes at Large, including the provisions of the Internal Revenue Code.

> complain that, could he have foreseen the increase, he would have kept the transaction unliquidated, but it will not avail him; he must be prepared for such possibilities, the system being already in operation. His is a different case from that of one who, when he takes action, has no reason to suppose that any transactions of the sort will be taxed at all.

Petitioners here were aware at least that they had to pay income tax and that proceeds from the real estate sale were taxable, and they should have been aware that gain from such sales were subject to the minimum tax.

The only revenue statutes held void for retroactivity by the Supreme Court involved wholly new type of taxes. Nichols v. Coolidge, 274 U.S. 531 (1927) (retroactive application of the first estate tax unconstitutional); and Blodgett v. Holden, 275 U.S. 142 (1927), and Untermyer v. Anderson, 276 U.S. 440 (1928) (retroactive application of the first gift tax unconstitutional). In 1976 the minimum tax was not such a "new" tax, upon which courts are likely to find a greater constitutional restraint. See Sidney v. Commissioner, 273 F. 2d 928 (2d Cir. 1960); and 1 Mertens, Law of Federal Income Taxation, Section 4.14.

The taxes in Welch v. Henry and First National Bank in Dallas, supra, were "newer" than the 1976 minimum tax, but even these were not unconstitutionally invalid. We find the application of the minimum tax here no more harsh and oppressive than the result in Picchione v. Commissioner, 54 T.C. 1490 (1970), affd. 440 F. 2d 170 (1st Cir. 1971), cert. denied 404 U.S. 8e8 (1971), where treatment of deferred payments from the sale in 1946 of a copyright was changed by the Revenue Act of 1950, 64 Stat. 906. Although proceeds from the sale of a copyright were treated as capital gains prior to that Act, the Court applied the definition of capital assets, as amended by the 1950 Act, to payments received after the effective date of the amendment and taxed those payments as ordinary income.

Petitioners contend that Congress was in error in taxing capital gains as a tax preference in 1976, and that this error is evident from Comgress' subsequent removal of an individual's capital gain as a tax preference, its creation of the alternative minimum tax, and its effective reduction of the tax rate on capital

gains.[3] This contention is without merit. Although Congress may have reconsidered its position on the issue, it simply did not make these changes effective for 1976.

We reject petitioners' challenges to the minimum tax, and although we agree that it is unfortunate that petitioners' sale was not completed in 1975, we must grant respondent's motion for judgment on the pleadings.[4]

An appropriate order and decision will be entered.

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3 See the Revenue Act of 1978, sections 421 and 402, 92 Stat. 2871 and 2867.

4 On brief respondent mentions an unpublished memorandum and order in the case of Darusmont v. United States, Civil No. F-77-192, (Eastern District of California), invloving similar circumstances, in which plaintiff's motion for summary judgment was granted. If the identical issue was indeed presented in Darusmont, we must, for the reasons set forth above, respectfully disagree with the result reached therein.

APPENDIX 13

MINIMUM TAX FOR TAX PREFERENCES
In Effect March, 1976

Sec. 56. Imposition of tax.

(a) In general. In addition to the other taxes imposed by this chapter, there is hereby imposed for each taxable year, with respect to income of every person, a tax equal to 10 percent of the amount (if any) by which--

(1) the sum of the items of tax preference in excess of $30,000, is greater than

(2) the sum of--

(A) the taxes imposed by this chapter for the taxable year (computed without regard to this part and without regard to the taxes imposed by sections 531 and 541) reduced by the sum of the credits allowable under--

(i) section 33 (relating to foreign tax credit),
(ii) section 37 (relating to retirement income),
(iii) section 38 (relating to investment credit),
(iv) section 40 (relating to expenses of work incentive program),
and
(v) section 41 (relating to contributions to candidates for public office); and . . .

Sec. 57. Items of tax preference.

(a) In general. For purposes of this part, the items of tax preference are---

(9) Capital gains.

(A) Individuals. In the case of a taxpayer other than a corporation, an amount equal to one-half of the amount by which the net long-term capital gain exceeds the net short-term capital loss for the taxable year.

TAX REFORM ACT OF 1976

APPENDIX14

TITLE III-- MINIMUM TAX AND MAXIMUM TAX

Sec. 301. MINIMUM TAX.

(a) In General.--Subsection (a) of section 56 (relating to minimum tax for tax preferences) is amended to read as follows:

"(a) General Rule.--In addition to the other taxes imposed by this chapter, there is hereby imposed for each taxable year, with respect to the income of every person, a tax equal to 15 percent of the amount by which the sum of the items of tax preference exceeds the greater of--

"(1) $10,000, or

"(2) the regular tax deduction for the taxable year (as determined under subsection (c))."

"(c) Regular Tax Deduction Defined.--For purposes of this section, the term 'regular tax deduction' means an amount equal to one-half of (or in cases of a corporation, an amount equal to) the taxes imposed by this chapter for the taxable year.....

(g) EFFECTIVE DATE--

(1) In General.--Except as provided by paragraph (4) the amendments made by this section shall apply to items of tax preference for taxable years beginning after December 31, 1975.

*1 paragraph 4 applies to certain financial institutions and in not applicable to appeal herein.

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OCTOBER TERM, 1980

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v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1172

LEROY AND LEONA BUTTKE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question presented in this federal income tax case is whether amendments to the minimum tax enacted on October 4, 1976, that increased its effective rate and broadened its applicability, can constitutionally be applied to transactions consummated during the entire taxable year beginning January 1, 1976.

The pertinent facts may be summarized as follows: In March, 1976, petitioners sold certain farmland for a cash sales price of $216,000. Because their basis in the property was $41,240, they realized a gain of $174,760 on the sale. After taking into account the deduction for one-half of net capital gains then permitted by Section 1202 of the Internal

Revenue Code of 1954, (26 U.S.C.),[1] petitioners included the remaining one-half of this gain ($87,380) in their taxable income. They paid income taxes of $18,420.45 for 1976 (Pet. App. 6; R. 4).[2] Petitioners, however, did not report any liability for the minimum tax resulting from this sale. On audit, the Commissioner determined that petitioners were subject to the increased minimum tax rates, enacted on October 4, 1976, and made retroactive for taxable years beginning after December 31, 1975. See Section 301(g)(1) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1553 (Pet. App. 5-6).

Petitioners contend that the 1976 amendments to the minimum tax provisions could not constitutionally be applied to transactions entered into prior to the enactment of those amendments. This case is controlled by the Court's recent decision in *United States* v. *Darusmont*, No. 80-243 (Jan. 12, 1981). There the Court held, on virtually identical facts, that the 1976 amendments to the minimum tax could constitutionally be applied to transactions consummated during the entire taxable year beginning January 1, 1976. Indeed, in so ruling, the Court cited the decision below with approval (slip op. 4, 8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981

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[1]For years beginning after October 31, 1978, this deduction was increased to 60% of the net capital gain. Revenue Act of 1978, Pub. L. No. 95-600, Section 402, 92 Stat. 2867.

[2]"R." refers to the record appendix bound with petitioners' brief in the court of appeals.

DOJ-1981-02